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No. ____

In The

Supreme Court of the United States

October Term, 1997

CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERALS COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka JANE DOE HUTCHINSON; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK McKEON, husband; JANE DOE McKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife,

Petitioners,

v.

MELTON NELSON; LANITA NELSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 2 of the Federal Arbitration Act permit an arbitration agreement, valid under state law, to be invalidated under a federal "knowing" agreement standard?

LIST OF ALL PARTIES

The parties to the proceeding in the Ninth Circuit are as set forth in the caption of this case.

Corporate petitioner Cyprus Bagdad Copper Corporation is a wholly owned subsidiary of Cyprus Climax Metals Company and has no non-wholly owned subsidiaries. Cyprus Climax Metals Company is a wholly owned subsidiary of Cyprus Metals Company, which is a wholly owned subsidiary of petitioner Cyprus Amax Minerals Company.

Corporate petitioner Cyprus Amax Minerals Company has no corporate parent and the following non-wholly owned subsidiaries: Amax Gold Inc.; Cyprus Pima Mining Company; Cyprus Plateau Mining Corporation; Las Quintas Serenas Water Co.; Oakbridge Pty Limited; PT Cyprus Amax Iriana; Rio Blanco Exploration, LLC; Sociedad Contractual Minera El Abra; Sociedad Minera Cerro Verde S.A.; and Yankeetown Dock Corporation.

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CITATION BELOW

The opinion of the Ninth Circuit is reported as *Nelson, et al. v. Cyprus Bagdad Copper Corporation, et al.*, 119 F.3d 756 (9th Cir. 1997). (App. 1-19)

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was entered on July 10, 1997. Its order denying the petition for rehearing was filed October 6, 1997. (App. 20-21) This Court has jurisdiction to review on a writ of certiorari the judgment below by virtue of 28 U.S.C. §1254.

STATUTE INVOLVED

Section 2 of the Federal Arbitration Act provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. §2.* (App. 24)

STATEMENT OF THE CASE

A. Proceedings Below

Nelson's[1] complaint was filed in federal district court and alleged, *inter alia,* that his discharge from employment

[1] Presumably because Arizona is a community property state, the individual parties' spouses were also named as parties in the complaint. Their inclusion is not material to the issues

violated the Americans With Disabilities Act, 42 U.S.C. §12101 *et seq.*, and the Arizona Civil Rights Act, A.R.S. §41-1401 *et seq.*[2] The district court dismissed these claims on summary judgment, holding that they were subject to an arbitration agreement valid *under Arizona law*. A split panel of the Ninth Circuit reversed and held that, *as a matter of federal law*, the arbitration agreement could not be enforced against Nelson's employment discrimination claims because he had not knowingly agreed to arbitrate them.

B. Material Facts

Cyprus Bagdad Copper Corporation (Cyprus) discharged Nelson from employment in October 1994 following his refusal to work a rotating shift. About a year before his discharge, Nelson received a revised employee handbook from Cyprus containing a Complaint Resolution Policy culminating in final and binding arbitration. (App. 30-35)

The handbook expressly advised that:

1. The Open Door Policy and the Complaint Resolution Policy are the sole and exclusive procedures for the processing and resolution of any problem, controversy, complaint, misunderstanding or dispute between an

---

presented and references to "Nelson" hereinafter will refer to Melton Nelson, the former employee of Cyprus, or to him and his spouse, as required by the context.

[2] The complaint also alleged post-discharge tortious conduct which was dismissed for lack of subject matter jurisdiction and is not in issue here.

employee and Cyprus Bagdad. This includes any claim that the provisions of this handbook have been violated and any claim that any state or federal statute or law applicable to your employment has been violated.

(App. 30)

2. The arbitrator shall have authority to decide statutory issues, including those arising under equal employment opportunity laws.

(App. 34)

3. The Open Door Policy and the Complaint Resolution Policy described in this Handbook are the sole and exclusive procedures for the processing and resolution of any problem, controversy, complaint, misunderstanding or dispute that may arise concerning any aspect of your employment or termination of employment, including any dispute arising out of or based upon any state or federal statute or law applicable to your employment, and including any dispute concerning a claim that the provisions of this Handbook have been violated. You are precluded from filing any action with any court concerning any matter which could have been addressed through these procedures.

(App. 36)

The last two pages of the handbook are identical and expressly acknowledge receipt of the handbook. (App. 37-40) Nelson signed and returned to Cyprus one of these pages. (App. 41-42)

C. Basis for Federal Jurisdiction

The district court had jurisdiction pursuant to 28 U.S.C. §1331 and 42 U.S.C. §§2000e-5(f)(3) and 12117(a).

REASONS TO ALLOW THE WRIT

This petition should be granted because the Ninth Circuit has applied the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* (FAA), in conflict with relevant decisions of this Court and decisions of other United States courts of appeals. The opinion below completely disregards the requirements of §2 of the FAA and the liberal federal policy favoring arbitration agreements. It also undermines the analytical framework established by this Court for resolving questions concerning the validity of agreements to arbitrate.

A. Conflict With Decisions of This Court

This Court has repeatedly held that §2 mandates that "ordinary state-law principles that govern the formation of contracts" determine whether a party has agreed to arbitrate particular matters. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, ___, 115 S. Ct. 1920, 1924 (1995). See, also, *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, ___, 116 S. Ct. 1652, 1656 (1996); *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527 n.9 (1987).

The liberal federal policy favoring arbitration applies to agreements to arbitrate employment discrimination claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991).

The Ninth Circuit, however, has disregarded state law and applied a purported principle of federal law when determining whether a valid arbitration agreement applicable to employment discrimination claims exists. The opinion below purports to follow *Prudential Insurance Co. Of America v. Lai*, 42 F. 3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995), in which the Ninth Circuit refused to enforce an arbitration provision in a National Association of Securities Dealers manual, holding that the employees, who had received and signed only a U-4 form, had not knowingly agreed to arbitrate their employment discrimination claims because they had not received the manual containing the arbitration provision and the U-4 form had not advised them that employment claims would be subject to arbitration.

In stark contrast to the facts in *Lai*, here the handbook received by Nelson contained the arbitration provision and expressly advised him both that employment discrimination claims would be subject to mandatory arbitration and that he would be precluded from pressing such claims in court. Nevertheless, the Ninth Circuit, in reliance upon the federal law principle it first recognized in *Lai*, refused to enforce the arbitration provision because it was not on the last page of the handbook received by Nelson, i.e., the page he actually signed and which expressly acknowledged his receipt of the entire document. (App. 12-13) Under the panel's rationale, no arbitration provision included in a broader agreement would be enforceable unless the provision appeared on the signature page of the agreement.

The decision of the panel below is an extreme example of judicial hostility to arbitration – a hostility this court has characterized as a vestige of an unenlightened era. *Gilmer,* 500 U.S. at 30, 111 S. Ct. at 1654. The opinion below undermines *Gilmer* by seizing upon a proported principle of federal law to find that Nelson never entered into an agreement to arbitrate. In so doing, the Ninth Circuit has completely disregarded controlling state law that this Court has mandated be applied.

The Arizona Supreme Court has held that a unilaterally promulgated employee handbook may become part of the employment agreement and, if an employer wishes to avoid that result, it need only include a disclaimer of contract status in the handbook. *Leikvold v. Valley View Community Hospital,* 141 Ariz. 544, 548, 688 P. 2d 170, 174 (1984). The Cyprus employee handbook contains no such disclaimer. The Arizona Supreme Court has also stated that "[e]mployment contracts . . . are the best and most typical examples of unilateral contracts," *Wagner v. City of Globe,* 150 Ariz. 82, 85, 722 P. 2d 250, 253 (1986), and that "[o]ne widely accepted means of modifying [them] is use or publication of personnel manuals, guides, or rules by employers." 150 Ariz. at 86, 722 P. 2d at 254. The Arizona Court of Appeals has applied these principles to enforce modified employee handbooks unilaterally issued. *Duncan v. St. Joseph's Hospital,* 183 Ariz. 349, 354 n.3, 903 P. 2d 1107, 1112 n.3 (App. 1995).[3]

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[3] As dissenting Judge Rymer pointed out below, Nelson has not disputed the district court's conclusion that the handbook had become part of his employment contract under Arizona law. (App. 19)

In summary, the decision below is in conflict with decisions of this Court in at least three fundamental respects: (1) it held that federal and not state law determines the existence of a valid agreement to arbitrate employment discrimination claims; (2) it substantially undermined this Court's holding in *Gilmer* that arbitration agreements *do* apply to federal employment discrimination claims; (3) it gave mere lip service to the federal policy favoring arbitration while, in effect, disregarding that policy in the context of employment discrimination claims.

B. Conflict With Other U.S. Courts of Appeals

The Ninth Circuit acknowledged its conflict with the decision of the Eighth Circuit in *Patterson v. Tenet Health Care, Inc.*, 113 F. 3d 832 (8th Cir. 1997), wherein a unilaterally issued employee handbook containing an arbitration provision was enforced to require arbitration of employment discrimination claims. The panel below summarily distinguished *Patterson*, stating that the Eighth Circuit simply had not adopted the *Lai* requirement that the existence of a knowing agreement to arbitrate employment discrimination claims be determined under federal law. (App. 14 n.12)

The decision below ignored and is also in conflict with the Fourth Circuit's opinion in *O'Neil v. Hilton Head Hospital*, 115 F. 3d 272, 275 (4th Cir. 1997), wherein an arbitration provision in an employee handbook was enforced to compel arbitration of federal employment claims under the Family and Medical Leave Act, 29 U.S.C. §2601 *et seq.*

CONCLUSION

Given the widespread inclusion of arbitration provisions in employee handbooks, the split in the circuits created by the Ninth Circuit's unique frustration of such provisions, and the Ninth Circuit's disregard of this Court's decisions, this Court should allow this petition.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELTON NELSON; LANITA NELSON, *Plaintiffs-Appellants*, v. CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERAL COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka Jane Doe Hutchinson; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK MCKEON, husband; JANE DOE MCKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife, *Defendants-Appellees.*	No. 95-17083 D.C. No. CV-95-00237-SMM OPINION

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
December 13, 1996 – San Francisco, California

Filed July 10, 1997

Before: Stephen Reinhardt and Pamela Ann Rymer, Circuit Judges, and Jack E. Tanner, District Judge.*

Opinion by Judge Reinhardt; Dissent by Judge Rymer

COUNSEL

Michael E. Medina, Jr., Kimble, Gothreau & Nelson, Tucson, Arizona, for the plaintiffs-appellants.

William M. Shattuck, Phoenix, Arizona, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

We are asked on this appeal to determine whether arbitration provisions contained in an Employee Handbook unilaterally issued by an employer serve to waive an employee's rights to a judicial determination of his claims under the Americans with Disabilities Act of 1990 and the Arizona Civil Rights Act.

I. FACTS

Plaintiff Melton Nelson worked as a full-time employee of Cyprus Bagdad Copper Corporation (Cyprus) for nineteen years, most recently as a Senior Maintenance Technician in the Electrical Department at the company's mine in Bagdad, Arizona. He asserts that he worked only day shifts prior to August 1994, when

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* The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

Cyprus initiated an extensive reorganization of its Bagdad mining operations. At that time, Cyprus announced its intention to eliminate over 100 salaried and hourly positions through a voluntary "Severance Enhancement Program" and, to the extent necessary, through involuntary layoffs and employee reclassifications – with those employees who volunteered receiving a better severance package than those who did not. Nelson also asserts that while considering voluntary severance he asked his supervisor how his department, and specifically, his position, might be affected by the changes. He contends that his supervisor told him that no major changes were planned, and, for that reason, he did not seek voluntary severance.

After the deadline for voluntary severance passed, the Electrical Department was reorganized and Nelson was required to work rotating 12-hour shifts. He contends that he notified his supervisor that he had previously experienced medical difficulties in working rotating shifts. After making some initial efforts to accommodate him, Cyprus terminated Nelson's employment in October 1994.[1]

THE HANDBOOK

In June 1993, a little over a year before Nelson was fired, Cyprus issued an Employee Handbook to each

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[1] The complaint was filed by Nelson and his wife. For purposes of this opinion, we treat Nelson as the plaintiff. *See infra* note 12.

employee. The Handbook contained a grievance resolution procedure that Cyprus asserts has applied to all employees since July 1, 1993, the effective date set forth in the Handbook. Nelson signed an acknowledgment that he had received the Handbook, and agreed to read and understand its contents, and to contact his supervisor if he had any questions:

> I have received a copy of the Cyprus Bagdad Copper Corporation Handbook that is effective July 1, 1993 and understand that the Handbook is a guideline to the Company's policies and procedures. I agree to read it and understand its contents. If I have any questions regarding its contents I will contact my supervisor or Human Resources Representative.

The Handbook contains a section entitled "Problem Solving Process." That section spells out two procedures for resolving employment disputes: (1) the "Open Door Policy" which provides informal access to supervisors and members of the company's management team and (2) the "Complaint Resolution Policy" which contains the more formal grievance process culminating in arbitration.

The "Scope of Employee Handbook" section of the Employee Handbook provides as follows:

> The Open Door Policy and the Complaint Resolution Policy described in this Handbook are the sole and exclusive procedures for the processing and resolution of any problem, controversy, complaint, misunderstanding or dispute that may arise concerning any aspect of your employment or termination of employment including any dispute arising out of or based

> upon any state or federal statute or law applicable to your employment, and including any dispute concerning a claim that the provisions of the Handbook have been violated. You are precluded from filing any action with any court concerning any matter which could have been addressed through these procedures.[2]

Under the Complaint Resolution Policy, an employee must submit a written complaint to his or her supervisor within ten days of the occurrence "that gave rise to your problem." If dissatisfied with the supervisor's response, the employee may appeal to his or her department manager within five days of receiving that response. If still dissatisfied, the Complaint Resolution Policy allows an appeal to the Vice President, within five days of receiving the department manager's response. The decisions of the Vice President are final *unless* a claim involves corrective action, discharge, or a claim that the Handbook's "Equal Opportunity/Non-harassment policy" has been violated. In these cases the employee "may appeal to arbitration." The appeal to arbitration must be made in writing and

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[2] Similarly, the "Problem Solving Process" section of the Handbook states that

> [t]he Open Door Policy and the Complaint Resolution Policy are the sole and exclusive procedures for the processing and resolution of any problem, controversy, complaint, misunderstanding or dispute between an employee and Cyprus Bagdad. This includes any claim that the provisions of this Handbook have been violated and any claim that any state or federal statute or law applicable to your employment has been violated.

submitted to the company's Human Resources Department within ten days of receiving the Vice President's response.

PROCEDURAL HISTORY

Two days after he was fired, Nelson sent a letter to Randy Scott, Vice-President and General Manager, complaining that his termination was "not only wrong but illegal."[3] Scott sent a written response one week later, in which he supported the termination and informed Nelson that

> [i]f you are not satisfied with this response, the next step of the Complaint Resolution Policy requires that you appeal to arbitration. The appeal to arbitration must be in writing and must be submitted to the Human Resources Department within 10 calendar days after you receive this response to your appeal.

According to Janette Bush, Manager of Human Resources at Cyprus, Nelson informed her both on the day he was fired and two days later that, upon advice of counsel, he would not appeal his termination to arbitration.

Instead, Nelson and his wife filed a complaint in the United States District Court alleging that the defendants had violated the Americans with Disabilities Act ("ADA"). The complaint also alleged a violation of the Arizona Civil Rights Act ("ACRA"), and asserted a

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[3] In their answering brief, defendants characterize Nelson's letter as an appeal of his termination "consistent with the Complaint Resolution Policy." Nelson's letter, however, makes no mention of the Complaint Resolution Policy.

number of other pendent state claims. Named as defendants were Cyprus Bagdad Copper Corporation, Cyprus Amax Minerals Company, and several Cyprus employees. The district court granted summary judgment to all defendants holding that the arbitration clause contained in Cyprus' Employee Handbook was enforceable and that Nelson had knowingly and voluntarily agreed to waive his rights to a judicial forum. The Nelsons appeal.

II. ANALYSIS

Defendants moved for summary judgment on the ground that Nelson's claims were foreclosed by his agreement to submit the disputes to the grievance and arbitration procedures set forth in the Cyprus Bagdad Copper Corporation's Employee Handbook. The district court analyzed the arbitrability of Nelson's claims under the waiver standard for Title VII claims we set forth in our opinion in *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), and held that "no genuine issue of material fact exists regarding whether Nelson knowingly and voluntarily waived his rights to file a statutory discrimination claim." Nelson argues on appeal that, contrary to the conclusion reached by the district court, there was no valid waiver of any of his statutory rights under the Americans with Disabilities Act and the Arizona Civil Rights Act, and that, accordingly, the district court erred in granting summary judgment. We agree.[4]

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[4] Nelson also argues that Section 1 of the Federal Arbitration Act ("FAA") broadly exempts employment contracts from its coverage. *See* Matthew W. Finken, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in*

Prior to 1991, when the Supreme Court announced its decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), federal anti-discrimination laws, specifically Title VII, had been "interpreted to prohibit any waiver of . . . statutory remedies in favor of arbitration, even a knowing waiver." *Lai*, 42 F.3d at 1304 (citing *E.E.O.C. v. Children's Hospital Medical Center*, 719 F.2d 1426, 1431 (9th Cir. 1983)). That interpretation found its source in a line of Supreme Court cases beginning with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Gilmer*, however, the Supreme Court held that individuals generally may contractually agree to arbitrate employment disputes and thereby waive certain statutory rights to which they would otherwise be entitled. *Lai*, 42 F.3d at 1303.

However, Congress can and sometimes does preclude waivers of a plaintiff's rights under a particular statute. *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996). Congressional intent to preclude waivers of statutory rights may be found in the text or legislative history of the act in question, or in an "inherent conflict" between the purported waiver and the act's underlying purposes.

Historical Clarification, 17 Berkeley J. Emp. & Lab. L. 282 (1996). Similarly, he contends that Arizona state law exempts employment contracts from coverage under its arbitration provisions. Accordingly, Nelson asserts that the arbitration clause at issue is unenforceable. In *Gilmer*, the Supreme Court expressly reserved the question whether Section 1 of the FAA broadly exempts employment contracts. 500 U.S. at 25 n.2. The scope of the Section 1 exemption remains an open question in this circuit, as well. *See Mago v. Shearson Lehman Hutton*, 956 F.2d 932, 934 (9th Cir. 1992). Because we reverse on other grounds, we again decline to reach that question, once more leaving it for another day.

Gilmer, 500 U.S. at 26. Here, we address the subject of Congressional intent, keeping in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).

When the question is whether a plaintiff may agree to waive a right to a judicial forum in favor of arbitration, it is the plaintiff's burden to demonstrate Congressional intent to forbid such a waiver. *Id.* In *Gilmer*, the Court concluded that the plaintiff had not demonstrated that Congress, in enacting the Age Discrimination in Employment Act ("ADEA"), had intended generally to preclude all waivers of the right to a judicial forum. We extended the *Gilmer* holding to claims brought under Title VII in *Mago v. Shearson Lehman Hutton*, 956 F.2d 932, 935 (9th Cir. 1992), holding that the plaintiff had not "met her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act."[5] We assume, *arguendo*, that the *Gilmer* holding regarding the enforceability of valid compulsory arbitration agreements applies in the context of the Americans with Disabilities Act as well.[6]

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[5] The plaintiffs in *Lai* argued that the *Gilmer* holding, and its extension to Title VII claims in our decision *Mago*, had been overruled by the Civil Rights Act of 1991. We found it unnecessary to reach that question in *Lai*, however, given our resolution of the appeal. *Lai*, 42 F.3d at 1303 n.2. We likewise find it unnecessary to do so here.

[6] In this appeal, Nelson does not argue that the legislative history of the ADA demonstrates that Congress intended to preclude waivers of statutory rights provided by the act or that

Nelson does not argue on appeal that all mandatory arbitration agreements are unenforceable under the ADA.[7] Instead, he argues that he may be required to arbitrate his claims under the ADA only if he "knowingly and voluntarily" agreed to waive his right to a judicial forum.[8] Just as Congress may entirely preclude a waiver

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Gilmer's limiting of *Gardner-Denver* should not be extended to claims under the ADA. *See* H.R.Rep. No. 101-485, pt. 3, at 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500 (stating that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act" and stating that "the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA"); H.R. Conf. Rep. No. 101-596, at 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598 (stating that "[i]t is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary" and adopting by reference "the statement of the House Judiciary Report [H.R. 101-485, pt. 3, at 76-77] regarding this provision"); *see also Developments in the Law – Employment Discrimination*, 109 Harv.L.Rev. 1568, 1677 (1996). Accordingly, we take no position on the issue, and assume, for the purposes of this appeal that *Gilmer* extends to claims brought under the ADA.

[7] By "mandatory arbitration agreements" we mean arbitration provisions that are contained in a general agreement or instrument of some kind and that mandate arbitration in the event that specific future disputes arise under the more general agreement. We do not consider in this opinion the validity of the narrower and more limited form of arbitration agreement that is entered into for the purpose of providing that a particular dispute that has already arisen will be submitted to arbitration and establishing the procedures governing the resolution of that particular dispute.

[8] The parties dispute whether compelling Nelson to submit his statutory claims to the grievance and arbitration procedures

of the plaintiff's statutory rights, it may create other more limited restrictions on the enforcement of arbitration agreements. *Kuehner*, 84 F.3d at 319. In *Lai*, we held that it was "apparent from the text and legislative history of Title VII" that Congress had required "at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes." *Lai*, 42 F.3d at 1304. In the case before us, the parties agree that the waiver analysis set forth in *Lai* applies equally in the context of the ADA. They are correct. Just as a knowing agreement to arbitrate disputes covered by the act is required by Title VII, so too a knowing agreement is required under the ADA.[9]

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established in the Handbook would entail more than a mere waiver of the right to a judicial forum. Nelson argues that the company's arbitration mechanism would, in addition, shorten the statute of limitations and deprive him of attorneys' fees and exemplary damages. We need not resolve that dispute here: for purposes of this decision, we assume that the arbitration clause at issue constitutes a waiver of the right to a judicial forum only. If in fact it purports to waive other statutory rights as well, the waiver is *a fortiori* invalid, given the result we reach here.

[9] The legislative history relied on in *Lai* to support its conclusion that there must be "at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived" a judicial determination of his or her rights under Title VII mirrors the legislative history to the enactment of 42 U.S.C. § 12212, the alternative dispute resolution provision of the ADA. *Compare Lai*, 42 F.3d at 1304 (quoting H.R. Rep. 102-40, pt. 1, at 97 (1991), *reprinted in*, 1991 U.S.C.C.A.N. 549, 635), *with* H.R.Rep. No. 101-485, pt. 3, at 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500, *and* H.R. Conf. Rep. No. 101-596, at 89 (1990), *reprinted in* 1990

The undisputed facts in the record before us demonstrate that Nelson did not enter into a "knowing agreement" to arbitrate his claims under the ADA.[10] First, we conclude that the acknowledgment form signed by Nelson does not suffice as a valid waiver under *Lai*. When Nelson was given a copy of the revised employee Handbook, he signed an acknowledgment of receipt. Nothing in that acknowledgment notified Nelson either that the Handbook contained an arbitration clause or that his acceptance of the Handbook constituted a waiver of his right to a judicial forum in which to resolve claims covered by the ADA. Under the express terms of the acknowledgment, Nelson agreed only to "read and understand" the Handbook. He did *not* agree to be bound by its provisions. Certainly, nothing in the acknowledgment form notified him that by agreeing to "read and understand," he was additionally agreeing to waive any rights or remedies afforded him by civil rights statutes

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U.S.C.C.A.N. 565, 598. Accordingly, if "at least" a knowing agreement to waive is required by Title VII, "at least" a knowing agreement to waive is required under the ADA.

[10] Our decision in *Lai* and the legislative histories of the Civil Rights Act of 1991 and the Americans with Disabilities Act of 1990 all suggest that the agreement may have to be both "voluntary and knowing" in line with the Supreme Court's discussion in *Alexander v. Gardner-Denver*. *See Lai*, 42 F.3d at 1305 (citing *Gardner-Denver*, 415 U.S. at 51-52 (discussing possible waivers of Title VII claims)); *see also* H.R. Rep. 102-40, pt. 1, at 97; H.R.Rep. No. 101-485, pt. 3, at 76-77; H.R. Conf. Rep. No. 101-596, at 89. Because we conclude that there was no "knowing" agreement here, we have no occasion to determine whether any such agreement must be "voluntary" as well or what that term might mean in the context of unilaterally promulgated employee handbooks.

that might be inconsistent with the terms set out in the Handbook. Indeed, the acknowledgment form itself suggests quite the opposite by characterizing the Handbook as a "guideline" to the company's unilaterally promulgated policies and procedures. Merely signing the form did not in any way constitute a "knowing agreement to arbitrate," and thereby to surrender his statutory right to a judicial forum.

Moreover, we conclude that Nelson's continued employment after he received the Handbook, and after he read it (and we assume he did), did not amount to the type of "knowing agreement" contemplated by *Lai*. Nothing in either the acknowledgment form or the Handbook itself put Nelson on notice that by not quitting his job he was somehow entering into an agreement to waive a specific statutory remedy afforded him by a civil rights statute. Any bargain to waive the right to a judicial forum for civil rights claims, including those covered by the ADA, in exchange for employment or continued employment must at the least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question. That did not occur in the case before us.

We conclude that, in line with *Lai*, the unilateral promulgation by an employer of arbitration provisions in an Employee Handbook does not constitute a "knowing agreement" on the part of an employee to waive a statutory remedy provided by a civil rights law. We conclude further that the right to a judicial forum is not waived even though the Handbook is furnished to the employee and the employee acknowledges its receipt and agrees to read and understand its contents. Finally, we hold that

the right is not waived even when the employee performs his obligations by commencing or continuing to do his assigned work and accepting a paycheck in return.[11] Accordingly, the district court erred in concluding that there was a valid waiver of Nelson's right to a judicial determination of his ADA claims and in granting summary judgment to the defendants.[12]

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[11] We also reject defendants' argument that "[t]he fact that Mr. Nelson initiated a complaint with the Company pursuant to the Problem Solving Process promulgated under the Employee Handbook" demonstrates a valid waiver. The case before us is entirely different from *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437 (9th Cir. 1994). In that case, plaintiff wrote a letter to the NEC's Human Resource Director "requesting to proceed with Step Four of NEC's problem resolution process – final and binding arbitration," and then "attended the hearings with a representative, presented evidence, and submitted a closing brief of fifty pages." *Id.* at 1440. Here, Nelson did not request arbitration. Indeed, at least twice he expressly refused to initiate or participate in arbitration. *See supra* note 3.

[12] All of the cases cited by the dissent with respect to the "knowing waiver" issue, except one, relate to the question of whether state or federal law applies. Of those cases, only *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997), involves the waiver of a statutorily provided right or remedy, and we note, with respect to that case, that the Eighth Circuit has not adopted the "knowing waiver" standard that is the controlling law in this circuit. We also note that, as a general proposition, the waiver of a federal right is a question of federal law. *See, e.g., Stroman v. West Coast Grocery, Co.*, 884 F.2d 458, 461 (9th Cir. 1989) (citing *Salmeron v. United States*, 724 F.2d 1357, 1361 (9th Cir. 1983), and *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981)). However, the question of which law is applicable is of no significance here; whether state or federal law applies, the answer is the same. The words, "I agree to read and understand" (an employee handbook) do not constitute an agreement to waive a remedy provided by Congress in a civil rights statute.

For the same reason that the court erred with respect to Nelson's ADA claims it erred with respect to his claims under the Arizona Civil Rights Act. In *Lai*, although plaintiffs brought their sexual harassment and discrimination claims under the relevant state statutes and did not sue directly under Title VII, we nevertheless examined the arbitrability of their claims under the Title VII "knowing agreement to arbitrate" standard. Noting that "[p]arallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme," we held that the same standard would apply to both. *Lai*, 42 F.3d at 1303 n. 1 (citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); and *Salgado v. Atlantic Richfield*, 823 F.2d 1322, 1326 (9th Cir. 1987)) The ADA expressly adopts Title VII's enforcement procedures, including the incorporation of parallel state anti-discrimination laws such as the relevant portions of the Arizona Civil Rights Act. *See* 42 U.S.C. § 12117. Accordingly, as in *Lai*, we hold that the question whether Nelson waived his rights under the ACRA is governed by the same standard as the question whether he waived his rights under the ADA. Given our conclusion with respect to the ADA claims, we must reverse as to the ACRA claims as well.[13]

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[13] Because the district court did not address Nelson's remaining state law claims separately and we are therefore uncertain as to the basis for its actions, and because the pertinent issues relating to those claims have not been adequately briefed on appeal, we vacate as to the other state law claims and leave to the district court the consideration in the first instance of their proper resolution in light of the decision we reach today. The parties also do not address Nelson's wife's claims separately. While we treat them, for purposes of this opinion, as if they were identical to Nelson's, we do not

III. CONCLUSION

Because we hold that Nelson did not knowingly waive his statutory rights to a judicial forum under the ADA and the Arizona Civil Rights Act, we reverse the decision of the district court granting summary judgment in favor of the defendants as to those claims and remand for further proceedings. We also vacate and remand as to the remaining claims.

REVERSED IN PART, VACATED IN PART and REMANDED.

RYMER, Circuit Judge, dissenting:

Both parties agree that employees *can* be bound by an agreement to arbitrate employment discrimination claims (including claims under the ADA) if they knowingly agree to do so. This much follows from *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), although Nelson does argue that employment contracts are exempt from coverage under the Federal Arbitration Act, 9 U.S.C. § 1. The majority opinion punts the coverage question, though it is unclear to me that it can be avoided since the arbitration provisions at issue in this case are in an Employee Handbook – not a securities registration application – and are binding (if at all) because they are part of Nelson's employment contract with Cyprus. *Cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2, (1991)

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foreclose the parties or the district court from considering any and all issues relating to those claims at the appropriate time in the proceedings.

(finding no need to address the scope of the § 1 exclusion as the arbitration clause being enforced was not in a contract of employment, but in Gilmer's securities registration application).

In any event, *Lai* indicates that an employee may only be obliged to arbitrate statutory claims such as those arising under Title VII if he or she has "knowingly agreed" to submit such disputes to arbitration. 42 F.3d at 1304. Neither Lai's U-4 form nor the U-4 manual described the types of disputes that were to be subject to arbitration, or referred to employment disputes. As there was no way that Lai could have understood that in signing the form, she was agreeing to arbitrate sexual discrimination suits, we held that Lai was not bound by any valid agreement to arbitrate employment discrimination claims. *Id.* at 1305.

Nelson's case cannot be so easily resolved, because Cyprus's Employee Handbook does specifically refer to arbitration of employment disputes including statutory claims and those arising under the equal employment opportunity laws.[1] The question, therefore, is whether the

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[1] It provides:

> "The Open Door Policy and the Complaint Resolution Policy . . . are the sole and exclusive procedures for the processing and resolution of any problem, controversy, complaint, misunderstanding or dispute that may arise concerning any aspect of your employment or termination of employment including any dispute arising out of or based upon any state or federal statute or law applicable to your employment . . . " (Employee Handbook, p. 57).

Employee Handbook, which Nelson acknowledged receiving and agreed to read and understand before it became effective, is a valid agreement to arbitrate employment disputes, including Nelson's ADA claim. Under *Lai*, this depends on whether Nelson "knowingly contract[ed] to forego [his] statutory remedies in favor of arbitration." *Id.*

The answer to this question, in turn, must depend on Arizona employment contract law. As the Supreme Court instructed in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, (1995), "[w]hen deciding whether the parties decided to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 1924; *see also Doctor's Assocs., Inc. v. Casarotto*, 116 S.Ct. 1652, 1655

"The Open Door Policy and Complaint Resolution Policy are the sole and exclusive procedures for the processing and resolution of any problem, controversy, complaint, misunderstanding or dispute between an employee and Cyprus Bagdad. This includes . . . any claim that any state or federal statute or law applicable to your employment has been violated." (Employee Handbook, p. 10).

"The Complaint Resolution Policy is a somewhat more formal procedure [than the Open Door Policy] that includes a provision for arbitration in cases involving corrective action, discharge, or a claim that the Equal Employment Opportunity/Nonharassment Policy has been violated." (Employee Handbook, p. 10).

"The arbitrator shall have authority to decide statutory issues, including those arising under the equal employment opportunity laws." (Employee Handbook, p. 13).

(1996) (noting that state law "concerning the validity, revocability, and enforceability of contracts" governs agreements to arbitrate); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, ___, 1997 WL 236237, at *1 (8th Cir. 1997) (following *First Options* and interpreting arbitration agreement in light of state law); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996) (same); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 78 F.3d 474, 478 (10th Cir. 1996) (same); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 452 (2d Cir. 1995) (same).

The district court noted that Arizona law recognizes that an employee handbook may be incorporated into an employment contract. *See, e.g., Leikvold v. Valley View Community Hosp.*, 688 P.2d 170, 174 (Ariz. 1984) (en banc). It found that Nelson's affidavit did not raise a genuine issue of fact regarding whether he knowingly and voluntarily contracted away his right to file a statutory discrimination claim in court, and concluded that Nelson was subject to the arbitration clause in the Employee Handbook.

Nelson, of course, contends that he did not knowingly and voluntarily enter into the arbitration clause, but he raises no issue on appeal, and doesn't argue, that the district court's conclusion was erroneous under Arizona law. For that reason, there is no need for us to go further.

The majority opinion's entire discussion about "knowing agreement," *supra* at 8128-30, is thus dicta and, beyond that, without persuasive force as it is also entirely without citation to authority. I therefore dissent.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELTON NELSON; LANITA NELSON Plaintiffs-Appellants, v. CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERAL COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka Jane Doe Hutchinson; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK MCKEON, husband; JANE DOE MCKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife, Defendants-Appellees.	No. 95-17083 D.C. No. CV-95-00237-SMM ORDER (Filed Oct. 6, 1997)

Before: REINHARDT and RYMER, Circuit Judges, and TANNER, District Judge.*

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELTON NELSON; LANITA NELSON, Plaintiffs-Appellants, v. CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERAL COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka Jane Doe Hutchinson; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK MCKEON, husband; JANE DOE MCKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife, Defendants-Appellees.	No. 95-17083 D.C. No. CV-95-00237-SMM ORDER (Filed Oct. 22, 1997)

Before: REINHARDT, Circuit Judge

Upon due consideration of appellees' motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari, such petition to be filed within 90 days of this order,

IT IS ORDERED that the motion for stay of mandate be granted. In the event that the petition for writ of certiorari is timely filed, "the stay shall continue until final disposition by the Supreme Court." Fed. R. App. P. 41(b).

9 U.S.C. § 2

§ 2 Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration on existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CYPRUS BAGDAD COPPER CORPORATION

EMPLOYEE HANDBOOK

LOGO CYPRUS
Bagdad Copper

Cyprus Bagdad Employee Handbook
Rev – Effective 07/01/93

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WELCOME TO CYPRUS BAGDAD COPPER CORPORATION

It is a pleasure to welcome you to your new job with Cyprus Bagdad Copper Corporation. Although we are part of a large company, the spirit of working together toward a common goal has not been lost.

Occasionally, questions concerning our company or your job will arise, and with that thought in mind, we have attempted to answer many of them with this handbook.

Cyprus Bagdad intends to continue to improve our quality of work life. Two areas that are crucial for this to be a successful effort are employee involvement and communications. Everyone's contribution here is important. We are individuals who contribute to the team effort. To keep

improving our operation, never accept existing conditions as "good enough." Seek safer, more efficient methods to accomplish your work. Work smarter. Talk about your ideas. Listen to your co-workers. Accept and look forward to change.

This handbook is written for all Cyprus Bagdad employees. It is a guide to the procedures, policies and philosophy by which we operate. This handbook may be periodically changed to keep pace with changing conditions. You will be notified of any changes. As you receive updated information about policies, please insert them in this Handbook. When any provisions of this Handbook are changed, the modified provisions will apply to your employment upon their effective date.

If you have any questions, you are encouraged to ask your supervisor, or any member of management about items covered in this Handbook, or other information concerning Cyprus Bagdad policies and practices as they apply to you and your job.

You will find Cyprus Bagdad Copper Corporations and Cyprus Minerals Company, our parent corporation, share histories that include change and adaptability. An interesting and challenging experience awaits you as an employee of Cyprus Bagdad. Our wishes are that you enjoy your employment here and that your experiences contribute to a successful career at Cyprus Bagdad.

Cyprus Bagdad
Management and Employees

* * *

PROBLEMS SOLVING PROCESS

We have a large, integrated, complex operation. As a result of being human and working together in a large, complex operation, problems are occasionally going to arise and these problems must be resolved.

At Cyprus Bagdad, we have two procedures, an Open Door Policy and a Complaint Resolution Policy, to address and resolve the problems that occasionally arise. The Open Door Policy and the complaint Resolution Policy enable us to address any problems which may arise.

The Open Door Policy is designed to address everyday problems quickly and informally. The Complaint Resolution Policy is a somewhat more formal procedure that includes a provision for arbitration in cases involving corrective action, discharge, or a claim that the Equal Employment Opportunity/Non-harassment Policy has been violated. You may use either the Open Door Policy or the Complaint Resolution Policy or, if you prefer, both of them, as long as you follow the established procedures.

The Open Door Policy and the Complaint Resolution Policy are the sole and exclusive procedures for the processing and resolution of any problem controversy, complaint, misunderstanding or dispute between an employee and Cyprus Bagdad. This includes any claim that the provisions of this Handbook have been violated and any claim that any state or federal statute or law applicable to your employment has been violated.

Open Door Policy

Our Open Door Policy at Cyprus Bagdad works. Here are the key principles of our Open Door Policy:

- To be open and above board with our employees.
- To be honest in addressing employee concerns and complaints.
- To be responsive to employee concerns by replying to them promptly after an employee meets with his supervisor about the matter.
- To be willing to provide access to any level of supervision (including, if necessary, bringing a problem to the Vice President) in order to address a problem or complaint.

Whenever possible, we strive to resolve problems or concerns at the first line supervisor level where the details and issues are often better understood. An essential part of your supervisor's job is to work through problem situations so all of us can focus on our work without unnecessary complications. However, at times you may wish to speak with someone other than your supervisor – perhaps a member of the Human Resources Department or even the Vice President. If you do, please come by the Human Resources Department and arrangements will be made for you to meet with any member of the management team who can address your problem or concern.

Our Open Door Policy is basic. We will be honest with you and we trust that you will do likewise.

Complaint Resolution Policy

If you wish to have your problem or complaint addressed through the Complaint Resolution Policy, you are welcome to do so. To use the Complaint Resolution Policy, you proceed as follows:

1. **Submitting Complaint**

   Your complaint must be in writing and submitted to your supervisor within 10 calendar days of the occurrence that gave rise to your problem. Your written complaint should include a description of the problem with a copy given to the Human Resources Department. If you would like assistance in writing the description of your problem, your human resources representative is available to assist you.

   Your supervisor will arrange for a meeting to discuss your complaint and will provide you with a written response. During this discussion, it is important that you are completely open and honest – "lay your cards on the table." That is the best way for your supervisor to understand your problem.

   In most cases, you will be able to resolve your problem by discussing it with your supervisor. If, however, you are not satisfied with your supervisor's response, you may appeal to your department manager. The appeal of your supervisor's response must be submitted within 5 calendar days after you receive that response.

2. **Appeal to Department Manager**

   You [sic] appeal to the department manager must be in writing, and a copy must be given to the Human Resources Department. If you would like assistance in writing the appeal, your human resources representative is available to assist you.

   Your department manager will arrange for a meeting to discuss your appeal and will provide you with a written response to your appeal. If you are not satisfied with your department manager's response, you may appeal to the Vice President. The appeal of the department manager's response must be submitted

within 5 calendar days after you receive that response.

3. **Appeal to the Vice President**

Your appeal to the Vice President must be in writing, and a copy must be given to the Human Resources Department. If you would like assistance in writing the appeal, your human resources representative is available to assist you.

The Vice President will arrange for a meeting to discuss your appeal and will provide you with a written response to your appeal. Except in cases involving corrective action, discharge, or a claim that the Equal Employment Opportunity/Non-harrassment policy has been violated, the Vice President's decision is final. If you are not satisfied with the vice President's response in cases involving corrective action, discharge, or the Equal Employment Opportunity/Non-harassment policy, you may appeal to arbitration.* The appeal to arbitration must be in writing and must be submitted to the Human Resources Department within 10 calendar days after you receive the Vice President's response to your appeal.

If your problem or complaint concerns your discharge, a written description of the problem should be submitted directly to the Vice President, with a copy given to the Human Resources Department, within 10 days of the date you are notified of your discharge.

If your supervisor, the department manager or the Vice President are not available to handle your problem or appeal, someone will act for them in handling it.

4. **Arbitration***

Unless the employee and the Company agree otherwise, the Company will request a list of arbitrators from the American Arbitration Association (AAA) after it receives an appeal to arbitration. The selection of an arbitrator and the arbitration will be conducted pursuant to the rules of the AAA.

* Arbitration is not available for the Vice President and General Manager.

The arbitrator shall have authority to decide statutory issues, including those arising under equal employment opportunity laws. Except in a case where there is a conflict with applicable law, the arbitrator shall have no authority to change, add to, subtract from, or limit the Company's policies, procedures, rules, regulations or the provisions of this Handbook, and any decision which does so is void. In the case of an employee who is disciplined or discharged for a violation of Rule 3 of the Rules of Conduct, the arbitrator's authority shall be limited to deciding any statutory issues and to deciding whether the employee violated the rule. The decision of the arbitrator shall be final and binding on the parties.

The Company will pay the cost normally associated with arbitration, with the exception of $300.00, which is the employee's portion of the cost of the arbitration. The employee must pay the $300.00 at the time that the appeal to arbitration is submitted. If an employee obtains all of the relief she sought in arbitration, the Company will reimburse the $300.00 paid by the employee. The employee will bear any costs associated with her witnesses, except that if the witnesses are Cyprus Bagdad employees, are legitimately and responsibly called as witnesses, and miss regularly scheduled work, the Company will pay

them for up to 2 days of work they necessarily miss as a result of being called as witnesses.

Should an employee desire to be represented by an attorney who is licensed to practice in Arizona, the Company will compensate the attorney for actual and reasonable attorney's fees up to a maximum of $3,000.00 The fees will be paid after receipt of the arbitrator's decision and an appropriate statement from the attorney. The employee shall select the attorney.

Some points that you should be aware of to help you with the resolution of your problem are:

- You may have a co-worker with you during any meeting to assist you in any way, to present additional information.

- If you do not feel your concern can or should be discussed with your supervisor, you should discuss the matter with a member of the Human Resources Department.

- Any matter taken to a member of your Human Resources Department will be held in strict confidence and will not be discussed with your supervisor or management unless you specifically agree to it. However, nondisclosure may limit management's ability to help resolve your problems.

- It is our commitment to respond to any questions or concern you have as soon as practical. If a solution cannot be implemented immediately, you will be informed.

* * *

SCOPE OF HANDBOOK

No employee or representative of Cyprus Bagdad or any related entity has any authority to make or attempt to make any oral, written or implied agreement or binding commitment concerning your employment that is contrary to or in excess of the provisions contained in the Employee Handbook. The Open Door Policy and the Complaint Resolution Policy described in this Handbook are the sole and exclusive procedures for the processing and resolution of any problem, controversy, complaint, misunderstanding or dispute that may arise concerning any aspect of your employment or termination of employment, including any dispute arising out of or based upon any state or federal statute or law applicable to your employment, and including any dispute concerning a claim that the provisions of this Handbook have been violated. You are precluded from filing any action with any court concerning any matter which could have been addressed through these procedures.

* * *

Copy A

CYPRUS BAGDAD COPPER CORPORATION
EMPLOYEE HANDBOOK
EMPLOYMENT PRACTICES AND GUIDELINES

This Handbook is subject to amendment, modification or termination at the Company's sole discretion. If any provisions of the Handbook are changed, you will be notified of the changes, and the modified provisions will apply to your employment upon their effective date.

If the provisions of this Handbook are in conflict with any Company policy, procedure or plan, such policy, procedure or plan will govern.

This handbook is intended as a guideline to help employees know and understand the general practices applicable to them while employed at Cyprus Bagdad.

This revised version of the Cyprus Bagdad Employee Handbook supersedes all prior versions that have been issued by Cyprus Bagdad and will be effective July 1, 1993. Amendments or modifications, if they occur, will be distributed with the proper effective date and should be inserted into this handbook.

I have received a copy of the Cyprus Bagdad Copper Corporation Handbook that is effective July 1, 1993 and understand the Handbook is a guideline to the Company's policies and programs. I agree to read it and understand its contents. If I have any questions regarding

its contents I will contact my supervisor or my Human Resources Representative.

Date _____ Name _____

Signature _____

Copy A – Remains in Handbook

Copy B – File Copy

Copy B

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its contents I will contact my supervisor or my Human Resources Representative.

Date 6-23-93 Name George Nelson

Signature /s/ George Nelson

Copy A – Remains in Handbook

Copy B – File Copy

(3)

Supreme Court, U. S.
FILED
JAN 5 1998
CLERK

No. 97-1137

In The

Supreme Court of the United States

October Term, 1997

CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERALS COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka JANE DOE HUTCHINSON; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK McKEON, husband; JANE DOE McKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife,

Petitioners,

v.

MELTON NELSON; LANITA NELSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MELTON W. NELSON, et al., Plaintiffs, v. CYPRUS BAGDAD COPPER CORP., et al., Defendants.	CIV 95-0237-PCT-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed Sept. 19, 1995)

On December 23, 1994, Plaintiffs brought this employment discrimination [sic] pursuant to the Americans with Disabilities Act of 1990 ("ADA") and the Arizona Civil Rights Act. Plaintiffs named as defendants Cyprus Bagdad Copper Corporation and Cyprus Amax Minerals Company (collectively referred to as "Cyprus") and several of its employee [sic].[1] Plaintiffs allege: wrongful discharge (Count I); breach of contract (Count II); breach of implied covenant of good faith and fair dealing (Count III); violation of the ADA (Count IV); violation of the Arizona Civil Rights Act (Count V); defamation (Count VI); tortious interference with contractual relations (Count VII); and intentional infliction of emotional distress (Count VIII).

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[1] Plaintiffs also named Jane Doe Scott, Jane Doe Hutchison, John Doe Bush, Jane Doe Mortimer, Jane Doe McKeon, Jane Doe Austin, Jane Doe Bramlett, and Jane Doe Flannigan in accordance with Arizona's community property laws. According to the Court's Rule 1.9(d), all Doe defendants are dismissed without prejudice. *See* Rules of Practice of the United States District Court, District of Arizona, 1.9(d) (1994).

Pending before the Court is Defendants' Motion for Summary Judgment of counts I, II, III, IV, V, and VI. On September 11, 1995, the Court held a hearing for oral argument on the motion. Because Plaintiffs submitted an unsigned affidavit in response to Defendants' motion, the Court granted Plaintiffs an additional five (5) days within which to cure the defect. Plaintiffs timely filed a signed and notarized affidavit and Defendants' Motion for Summary Judgment is now ready for review.

I. FACTUAL BACKGROUND

Plaintiffs allege the following facts. Nelson was a full-time employee of Cyprus for approximately nineteen (19) years. Prior to termination, Nelson worked the day shift as a Senior Maintenance Technician in the Mine Electrical Department. In August of 1994, Cyprus planned to re-organize the company, announced its intent to lay off over one hundred (100) employees, and offered its employees the option of volunteering to be laid off with a severance package. Nelson asked his maintenance manager, Defendant Hutchison, how the Mine Electrical Department would be affected by the re-organization. Hutchison informed Nelson that no major changes were planned for Nelson or the Department. Nelson did not volunteer to be laid off.

After the deadline for volunteering, Defendant McKeon informed Nelson that he would have to work 12-hour rotating shifts. Nelson informed McKeon that Nelson previously had medical problems with working a 12-hour rotating shift. Nelson was thereafter medically examined by Cyprus's physician, who recommended that

psychological and psychiatric testing may help to diagnose the problem. On September 30, 1994, Cyprus placed Nelson on suspension and on October 11, 1994, terminated Nelson's employment. Nelson thereafter appealed his termination to Defendant Scott, Cyprus's General Manager, who affirmed the termination. Nelson did not appeal the denial to an arbitrator.

Nelson thereafter became employed by an independent contractor, Dan McIntyre, who does contract work for Cyprus. McIntyre terminated Nelson's employment.

II. STANDARD OF REVIEW

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (1995); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Substantive law determines which facts are material. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* The dispute must also be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Id.* at 317. The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-88 (1986).

III. DISCUSSION

Plaintiffs claim that at the time Cyprus terminated Nelson's employment, there existed several positions in the Department that did not require a rotating shift and for which he was qualified. Plaintiffs also claim that Defendants pressured or otherwise caused McIntyre to terminate Nelson's subsequent employment. Defendants argue that all of Plaintiffs' claims are barred because Nelson failed to address the claims through the "Problem Solving Process" outlined in Cyprus's employee handbook. In the alternative, Defendants move to dismiss Count I through V as against all individual Defendants as improper parties and to dismiss Count VI against all Defendants as a matter of law.

A. *Employee Handbook*

Arizona courts have long recognized that an employee handbook may be incorporated into an

employment contract. *e.g., Liekvold v. Valley View Community Hosp.*, 688 P.2d 170, 171 (Ariz. 1984). Cyprus's Employee Handbook, which became effective on July 1, 1993, contains grievance procedures for resolution of employment related disputes. According to the Employee Handbook, an aggrieved employee may: (1) informally pursue a complaint through an "open door" policy ("Open Door Policy") or (2) formally file a written complaint with the supervisor, department manager, or vice president through the Complaint Resolution Policy, and, if necessary, appeal to arbitration ("Complaint Resolution Policy"). Bush Aff., Ex. A (Employee Handbook), at 10-13. According to the Handbook:

> The Open Door Policy and the Complaint Resolution Policy are the sole and exclusive procedures for resolving [sic] "[sic] any problem, controversy, complaint, misunderstanding or dispute between an employee and Cyprus Bagdad. This includes any claim that the provisions of this Handbook have been violated and any claim that any state or federal statute or law applicable to your employment has been violated.
>
> You are precluded from filing any action in any court concerning any matter which could have been addressed through these procedures.

Id. at Ex. A, at 10, 57.

B. *Arbitrability of Plaintiffs' Discrimination Claim*

Plaintiffs argue that the arbitration clause in the Employee Handbook is not enforceable as against public policy. Plaintiffs also argue that even if the arbitration clause applies, Nelson did not knowingly and voluntarily

waive his rights to bring these claims. *See* Nelson Aff., at ¶ 2.

The Federal Arbitration Act ("FAA") provides that:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994). Section 1 of the FAA, however, exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1. The FAA also provides for a stay of judicial proceedings where an issue may be referred to arbitration or where a party has failed to comply with the arbitration agreement. *Id.* § 4.

A party claiming that a claim is not arbitrable despite the requirement of arbitration in an employment contract has the burden of establishing that Congress intended to exclude the claim from the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). In *Gilmer,* a case pursuant to the Age Discrimination in Employment Act ("ADEA"), the United States Supreme Court addressed whether the FAA prohibits compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application. *Id.* at 1650. Recognizing that "the federal policy favoring arbitration," the Court rejected the plaintiff's argument that enforcing arbitration agreements would be inconsistent with the public policy in enforcing the ADEA. *Id.* at 1652-53. The Court

also recognized that enforcement of arbitration agreements is consistent with Congress's intent to permit "informal methods of conciliation, conference, and persuasion." *Id.* at 1654 (citing 29 U.S.C. § 626(b) referring to the Equal Employment Opportunity Commission). The Court did not, however, directly address whether § 1 of the FAA excludes all "contracts of employment." *Id.* at 1651 n.2.

Plaintiffs rely on the Sixth Circuit Court of Appeals's decision in *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991). In *Willis*, the defendant sought to compel the plaintiff to arbitrate her sexual discrimination claim pursuant to the arbitration clause included in the plaintiff's securities registration application. *Id.* at 306. In reversing the trial court's denial of the defendant's motion to compel, the court interpreted *Gilmer* to note that all employment contracts with employers who are subject to Title VII or other anti-discrimination statute fall within the meaning of the exempted "contracts of employment" under § 1. 948 F.2d at 311. The court found that because the anti-discriminatory statutes were enacted pursuant to Congress's power to regulate interstate commerce, any employer subject to the statute would necessarily engage in interstate commerce and fall within the exclusion of "contracts of employment" under § 1. *Id.*

The Ninth Circuit has not directly addressed whether all employment contracts are exempted from the FAA.[2] The Ninth Circuit, however, favors arbitration and requires courts to "rigorously enforce agreements to arbitrate" with "any doubts concerning the scope of arbitrable issues . . . resolved in favor of arbitration." *See Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 971 (9th Cir. 1992) (citations and internal quotations omitted). Recently, in *Prudential Ins. Co. of America v. Lai*, the Ninth Circuit reversed a district court's order compelling arbitration of sexual discrimination claims because the plaintiff did not knowingly enter into the arbitration agreement. 42 F.3d 1299 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3861 (May 22, 1995). In its analysis, the court discussed the arbitrability of statutory claims and recognized that pursuant to *Gilmer*, the Ninth Circuit has extended the arbitrability of Title VII employment discrimination and parallel state statutory employment discrimination claims. *Id.* at 1303, 1303 n.1. (citations omitted). Indeed, the court unequivocally noted that although "[t]he issue before us . . . is not whether employees may ever agree to arbitrate statutory employment claims; they can." *Id.* The Court therefore concludes

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[2] Plaintiffs submitted a supplemental list of authority citing *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994). *Graham Oil* addressed the validity of an arbitration clause in a distributor agreement, not an employment agreement. The *Graham Oil* court held that the arbitration clause was invalid because the clause specifically limited the provisions of the Petroleum Marketing Practices Act. 43 F.3d at 1249. As such, *Graham Oil* is limited to its facts and does not address the broader question of whether all employment agreements are exempted from the FAA.

that the arbitration clause in the Employee Handbook is enforceable so long as Nelson knowingly waived his right to file a judicial claim. *See id.; see also Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO,* 739 F.2d 1159, 1162 (7th Cir.), *cert. denied,* 469 U.S. 1160 (1984) ("contracts of employment of . . . workers engaged in foreign or interstate commerce" is limited to workers employed in transportation industries). Accordingly, Plaintiffs' failure to comply with the arbitration clause may act as a waiver so long as Plaintiffs knowingly and voluntarily waived the right to a [sic] instituting a judicial claim. *See Prudential Inc.,* 42 F.3d at 1305.

Plaintiffs argue that Nelson did not knowingly waive his right to file a statutory discrimination claim. Plaintiffs claim that at the time Nelson received the Handbook, Cyprus did not inform him that he would be waiving his right to bring a statutory discrimination claim. Plaintiffs also claim that Nelson was not aware that he would be precluded from commencing this action. *See* Nelson Aff., at ¶ 3. Nelson attests that he was at no time "informed . . . that failure to submit [the] claim to arbitration precluded [him] from filing a statutory discrimination claim." *Id.* at ¶ 4.

Defendants presented evidence demonstrating that Nelson received the Employee Handbook containing the arbitration clause prior to its effective date. *See* Bush Aff., Ex. B. When Defendant Scott denied the appeal, he advised Nelson that he must appeal to arbitration within ten (10) calendar days of receiving the denial. *Id.* at Ex. D. Defendant Bush also reminded Nelson of his obligation to appeal to arbitration. Bush Aff., at ¶ 14. Bush further attests that Nelson advised her "that he would not appeal

to arbitration based on the advice of his attorney." *Id.* at ¶ 14.

Although Nelson disputes that Ms. Bush informed him of the arbitration requirement, Plaintiffs present no specific evidence to contradict Defendants' facts. Nelson's affidavit, however, is cursory and conclusory. Such an affidavit, without more, is insufficient to defeat a summary judgment motion. *See* Fed. R. Civ. P. 56(e); *Matsushita,* 475 U.S. 585-88. Accordingly, no genuine issue of material fact exists regarding whether Nelson knowingly and voluntarily waived his rights to file a statutory discrimination claim. Absent specific facts creating a genuine dispute, the Court finds that Nelson knowingly and voluntarily agreed to the arbitration clause. Mere allegations and general argument are insufficient to defeat a motion for summary judgment. *See Matsushita,* 475 U.S. at 585-88. Accordingly, the Court finds as a matter of law that Plaintiffs are subject to the arbitration clause contained in the Employee Handbook. *See Bennett,* 968 F.2d at 971. Accordingly, Defendants are entitled to summary judgment of counts I through VI. *See Celotex* 477 U.S. at 322-23.

C. *Jurisdiction over Counts VII and VIII*

Counts VII and VIII are based on state law. According to the Complaint, Plaintiffs are residents of Arizona. Although Defendant Cyprus is a Delaware corporation, doing business in Arizona, all remaining Defendants are residents of Arizona. *See* Compl., at 3-6. Therefore, complete diversity does not exist between the parties. Absent complete jurisdiction, the Court has no subject matter

jurisdiction over state law claims. *See* 28 U.S.C. § 1332 (1994). Therefore, the Court dismisses counts VII and VIII for lack of subject matter jurisdiction.

IV. CONCLUSION

Based on the foregoing reasons, the Court finds it unnecessary to address Defendants' alternative motion to dismiss counts I through V as against all individual Defendants as improper parties and to dismiss Count VI against all Defendants as a matter of law.

IT IS THEREFORE ORDERED Defendants' Motion for Summary Judgment is GRANTED as to counts I, II, III, IV, V, and VI. **(DOC #18).**

IT IS FURTHER ORDERED count VII and VIII are dismissed for lack of subject matter jurisdiction.

DATED this 18 day of September, 1995.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Copies to all counsel of record

No. 97-1137

(4)

Supreme Court, U.S.
FILED
MAR 9 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERALS COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka JANE DOE HUTCHINSON; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK McKEON, husband; JANE DOE McKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife,

Petitioners,

v.

MELTON NELSON; LANITA NELSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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app.

QUESTION PRESENTED

Did the court properly rule that Nelson was entitled to bring suit in federal court and not required to arbitrate his federal and state statutory discrimination claims when it is undisputed that (1) Nelson never signed an agreement to arbitrate his federal and state statutory discrimination claims and (2) both federal and state law require a knowing and voluntary waiver before an employee is required to arbitrate his federal and state statutory discrimination claims.

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STATEMENT OF THE CASE

A. Proceedings Below

Nelson disagrees with Cyprus' contention that the district court held the arbitration clause was valid under Arizona law. Cyprus' statement implies the district court did not address the "knowing and voluntary" requirement. The district court did discuss the validity of the arbitration clause under Arizona law (Supp. App. 4-5), and also addressed the "knowing and voluntary" requirement. (Supp. App. 5-7). The district recognized a distinction existed between any Arizona common law claims and Nelson's discrimination claim when it set forth two separate arguments to address these distinct claims. (Supp. App. at 4-7).

Moreover, the Ninth Circuit pointed out in its decision that the waiver of a federal right involved a question of federal law. (App. 14).

B. Material Facts

Nelson was a full-time employee of Cyprus for approximately 19 years at the Cyprus' mine located in Bagdad, Arizona. (App. 2). In 1993, after Nelson had worked for Cyprus for almost eighteen years, Cyprus unilaterally promulgated an employee handbook that was to become effective July 1, 1993. (App. 3-4). The handbook contained a "Problem Solving Process." (App. 30-35). The process provided a "Complaint Resolution Policy." (App. 31-35). The Complaint Resolution Policy contained an abtitration clause. (App. 33-35). The clause located prior to the arbitration clause provided in part:

> If you are not satisfied with the Vice President's response in cases involving corrective action, discharge, or the Equal Opportunity/Non-harassment policy, you may appeal to arbitration. The appeal to arbitration must be in writing and must be submitted to the Human Resources Department within 10 calendar days after you receive the Vice President's response to your appeal.

(App. 33). The arbitration clause was found at pages 12-13 of the handbook. The handbook also contained an acknowledgment form which provided:

> I have received a copy of the Cyprus Bagdad Copper Corporation Handbook that is effective July 1, 1993 and understand the Handbook is a guideline to the Company's policies and procedures. I agree to read it and understand its contents. If I have any questions regarding its contents I will contact my supervisor or Human Resources Representative.

(App. 37-38). The acknowledgment form was located in the back of the handbook, which contained fifty-eight pages of material.

At no time prior to the effective date of the handbook or afterwards was Nelson informed that the handbook contained an arbitration clause which precluded him from bringing a cause of action for violation of federal and state anti-discrimination laws. (App. 12-13).

REASONS TO DENY THE PETITION

This Court should not grant Cyprus' petition for writ of certiorari because the Ninth Cirucit decision is limited to the factual idiosyncracies of the particular arbitration clause that was at issue. There is no conflict between the decision and this Court's decisions regarding the application of federal and state law to arbitration clauses relating to waiver of federal rights. There is no conflict amongst the circuits regarding the application of the "knowing and voluntary" standard to federal statutory claims.

A. The Arbitration Clause at Issue Contained Factual Idiosyncracies Which Establish Certiorari Should Not Be Granted.

In July 1993, the Cyprus Employee Handbook, at issue in this case, became effective. (App. 3-4). The handbook contained a "Problem Solving Process" which was found at pages 10-13 of the handbook. (App. 30-35). The "Problem Solving Process" provided a "Complaint Resolution Policy" which contained an arbitration clause. (App. 33-35). The clause located immediately prior to the arbitration clause, which was entitled "Appeal to the Vice President", noted:

> If you are not satisfied with the Vice President's response in cases involving corrective action, discharge, or the Equal Opportunity/Non-harassment policy, you may appeal to arbitration. The appeal to arbitration must be in writing and must be submitted to the Human Resources Department within 10 calendar days after you receive the Vice President's response to your appeal.

In the back of the handbook, there was an acknowledgment form that employees were required to sign and return to Cyprus. (App. 37-38). The acknowledgment declared:

> I have received a copy of the Cyprus Bagdad Copper Corporation Handbook that is effective July 1, 1993 and understand the Handbook is a guideline to the Company's policies and procedures. I agree to read it and understand its contents. If I have any questions regarding its contents I will contact my supervisor or Human Resources Representative.

(*Id.*).

The decision by the Ninth Circuit pointed out the acknowledgment failed to notify an employee that the handbook contained an arbitration clause or that acceptance waived an employee's rights to a judicial forum. (App. 12-13). The Ninth Circuit noted the acknowledgment simply provided that an employee agreed to "read and understand" the Handbook. (*Id.*). There was nothing in the agreement that indicated the employee agreed to be bound by the Handbook. (App. 12). The Ninth Circuit also pointed out the terms of the Handbook indicated the Handbook was a "guideline" to Cyprus' policies and procedures. (App. 13). Nelson also was not informed by any representative of Cyprus that the arbitration clause waived his rights to bring a statutory discrimination claim. The terms of the acknowledgment of receipt of the handbook establish that Nelson did not have access to the handbook before signing the acknowledgment. By simply signing that he had received the employee handbook, Mr. Nelson did not agree to forego his rights to the remedies

and procedures under statutory discrimination provisions. These facts establish the distinct nature of the Cyprus' handbook and reflect that certiorari should not be granted.

Moreover, since the decision in this case was rendered, Cyprus has substantially modified its employee handbook. Nelson recognizes the modified Employee Handbook, which became effective August 1, 1997, was not before the Ninth Circuit and did not influence the decision in this matter.[1] Nevertheless, the modified handbook establishes the issue is not one of importance worthy of certiorari since Cyprus, itself, has modified its handbook and any decision by this Court will only affect Nelson.

The modified handbook demonstrates that Cyprus and other employers can draft handbooks that conform to the "knowing and voluntary" standard. The modified handbook contains a separate appendix which contains the "Problem Solving Process." The acknowledgment has been modified to provide:

> I have received a copy of the Cyprus Bagdad Copper Corporation Problem Solving Process that is effective August 1, 1997. I understand that this Problem Solving Process is meant to be an enforceable contract between me and Cyprus Bagdad. I agree to read it and understand its contents. If I have any questions regarding its

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[1] A copy of the modified Employee Handbook is attached as an Appendix to this opposition.

contents, I will contact my supervisor or my Human Resources Representative.

B. Arizona Law Requires a "Knowing and Voluntary" Waiver Before an Arbitration Clause is Enforceable Regarding Statutory Discrimination Claims.

Cyprus contends the Ninth Circuit erroneously disregarded Arizona law and has applied a federal standard when determining whether a valid arbitration agreement existed. Cyprus' contentions are unpersuasive since Arizona case law has also applied the "knowing and voluntary" standard and held arbitration clauses contained in preprinted forms and offered on a "take it or leave it basis" to be unenforceable adhesion contracts.

Any distinction between federal and Arizona law regarding the enforceability of arbitration clauses in the employment area ended with the Arizona Court of Appeals decision in *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 937 P.2d 1382 (1996).[2] Unlike the Arizona

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[2] The Arizona decisions cited by Cyprus, *Liekvold v. Valley Community Hospital*, 141 Ariz. 544, 688 P.2d 170 (1984); *Wagner v. City of Globe*, 150 Ariz. 82, 722 P.2d 250 (1986); *Duncan v. St. Joseph's Hospital*, 183 Ariz. 349, 903 P.2d 1107 (App. 1995), did not address the issue of whether an employer could preclude an employee from bringing a statutory discrimination claim by unilaterally requiring an employee to follow an internal grievance policy. These decisions simply indicate that an employee handbook may become part of the employment relationship not that an employer may by a handbook usurp the power of Congress and preclude an employee from pursuing federal statutory remedies in federal court.

decisions cited by Cyprus, in *Francini* the issue before the court was whether an employee's disability discrimination action had been properly dismissed because the employee had not utilized the employer's grievance procedures including an arbitration clause. *Id.* at 578, 937 P.2d at 1384. The court held:

> Even an employee who enters into an individual employment agreement may not be deemed to have waived the statutory rights, remedies, and procedural protections contained in Title VII and related state remedies unless the employee knowingly agreed to arbitrate employment disputes. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1304-05 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 61 (1995).

Id. at 583, 937 P.2d at 1389 (footnote omitted).

Previous to the *Francini* decision, the Arizona Supreme Court had held in an analogous situation that an arbitration clause contained on a preprinted form that was required to be signed by patients as a condition of treatment was not enforceable because it was an adhesion contract. *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (1992). The court found the printed form agreement contained all the characteristics of a contract of adhesion. *Id.* at 151, 840 P.2d at 1016. The court explained:

> The form is a standardized contract offered to plaintiff on a "take it or leave it" basis. In addition to removing from the courts any potential dispute concerning fees or services, the drafter inserted additional terms potentially advantageous to itself requiring the arbitrator appointed by the American Arbitration Association by

> a licensed medical doctor specializing in obstetrics/gynecology. The contract was not negotiated but was, instead prepared by the defendant and presented to plaintiff as a condition of treatment. Staff at the clinic neither explained its terms to plaintiff nor indicated that she was free to refuse to sign the form; they merely represented to plaintiff that she had to sign the three forms.

Id. The court found the arbitration clause was not within the patient's reasonable expectations and was unenforceable. *Id.* at 152, 840 P.2d 1017. The court also held the arbitration clause could have been unenforceable because it was unconscionable. *Id.*

Based upon these decisions, the application of Arizona law would not have altered the decision rendered by the Ninth Circuit. Arizona law requires before an employee may have been deemed to forego statutory rights that the employee must have knowingly agreed to arbitrate the employment disputes. Arizona law is consistent with federal law in this realm. Additionally, Arizona law has rendered arbitration clauses such as those contained in the Cyprus' handbook to be unenforceable adhesion contracts.

C. There Is No Conflict with Decisions of this Court.

The decisions of this Court that Cyprus relies upon for the proposition that state law applies to determine whether there has been an agreement to arbitrate are

distinguishable.[3] *First Options of Chicago*, 514 U.S. 938 (1995) and *Doctor's Associates, Inc. v. Casarotto*, ___ U.S. ___, 116 S. Ct. 1652 (1996). The issues in *First Options* did not involve any federal rights and instead simply involved the issue of whether a husband and wife were personally liable for the debts that a corporation owed to a firm that clears stock trades. 514 U.S. at 942. Likewise, in *Doctor's Associates*, the issues involved a standard franchise agreement and did not implicate any federal rights. ___ U.S. at ___, 116 S. Ct. at 1654. The question before the Ninth Circuit involved federal law, in particular the Americans with Disabilities Act.

This Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991), held it was appropriate to examine the legislative text and history to determine Congress' intent regarding waiver of statutory rights under federal anti-discrimination statutes. Therefore, necessarily the arbitrability of federal statutory claims involves federal law and not only state law. The legislative history of the Americans with Disabilities Act reveals any waiver should be "knowing and voluntary."

Furthermore, this Court has held "courts should remain attuned to well-supported claims that the agreement resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991), *quoting*, *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614,

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[3] Additionally, as noted supra, the application of state law would yield the same result.

627 (1985). This Court has also held a party cannot be bound to an arbitration agreement, unless he or she actually agreed to submit the specific claim to arbitration. *AT & T Techologies v. Communications Workers of America*, 475 U.S. 643 (1986), *see also, Mitsubishi Motors Corp.*, 473 U.S. at 626 (the threshold question must always be whether the agreement to arbitrate was voluntary and intentional). Finally, as one court has noted, it would be paradoxical for Congress to have given employment discrimination plaintiffs the rights to a jury trial for the first time and to have enabled those rights to have been taken away without their consent. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997).

The Ninth Circuit correctly held under federal and state law there must have been a "knowing and voluntary" waiver.

D. There Is No Conflict Amongst the Circuits Regarding the Knowing and Voluntary Standard.

The arbitration clause contained in the Court of Appeals decisions cited by Cyprus are distinguishable. *Patterson v. Tenet Health Care, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997). *Id.* The arbitration clause in *Patterson* was separate and distinct from the other provisions of the handbook. *Id.* It contained an acknowledgement form which contained language such as "I understand" and "I agree." *Id.* The acknowledgment specifically provided "I agree to submit any complaints to the published process and agree to abide by and accept the final decision of the arbitration panel . . . " *Id.* Because the court deemed these

actions *in toto* sufficient to render the arbitration clause "separate and distinct" from the remainder of the handbook the court held the internal grievance and arbitration clause constituted an enforceable contract. *Id.*

The arbitration clause in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 275 (4th Cir. 1997), contained identical language to that found in *Patterson*. Thus, *O'Neil* can be similarly distinguished from the Ninth Circuit's decision.

Recently, the circuits that have rendered decisions on the issue have held the knowingly and voluntary standard applies to arbitration clauses involving waiver of statutory claims under federal anti-discrimination laws. *Ramirez-De-Arellano v. American Airlines*, 133 F.3d 89, 90-91 (1st Cir. 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129-30 (7th Cir. 1997).

In *Ramirez-De-Arellano*, the First Circuit was faced with the same issue presented to the Ninth Circuit, whether an arbitration clause contained in an unilateral and adhesive employee handbook was enforceable. 133 F.3d at 90. The First Circuit found "the threshold question for review must always be whether the agreement to arbitrate was, indeed, voluntary and intentional." *Id.* The court held:

> Given the apparently unilateral and adhesive nature of American's employee handbook, we do not embrace the argument that Ramirez voluntarily waived his right to pursue his claims in federal court.

Id. at 90-91. In a footnote supporting its decision, the First Circuit cited the Ninth Circuit's decision in this case. *Id.* at 91, note 2. The First Circuit was also able to apply this

decision and the *Patterson* decision without any difficulty. *Id.* The First Circuit having pointed out distinctions between the arbitration clause contained in this case and the arbitration clause in *Patterson. Id.*

The Seventh Circuit has held the strongest case for finding an employee agreed to arbitration is "when the record indicates the employee has knowingly agreed to do so." *Gibson,* 121 F.3d at 1130. The court pronounced if such conditions are present then "the twin goals of protecting federal rights and resolving claims through arbitration will be effected." *Id.* The court did decline to address whether a "knowing and voluntary" consent is required, the court did declare "we therefore stress the advantage of arbitration agreements that are the product of an employee's knowing and voluntary consent, . . . " *Id.* The court noted the knowing and voluntary requirement and ensuring that employees understand the agreement "need not be unduly burdensome." *Id.*

The court did hold the arbitration clause was invalid because there was no bargained for consideration. *Id.* at 1130. The court rejected that the employee's continued employment was sufficient consideration. *Id.* at 1132. The court explained:

> NHC never made a promise to continue Gibson's employment in exchange for her promise to submit her claims to arbitration. That is, it never communicated to her that if she signed the Understanding she could continue to work there, and that if she did not her status would be uncertain.

Id.

Several other courts have applied the "knowing and voluntary" standard to cases involving the arbitrability of statutory discrimination claims. *Berger v. Cantor Fitzgerald Securities*, 942 F. Supp. 963 (S.D.N.Y. 1996) (the issue of notice is relevant to the scope of an arbitration agreement and whether a voluntary agreement to arbitrate was made); *Hoffman v. Aaron Kahmi, Inc.*, 927 F. Supp. 640 (S.D.N.Y. 1996) (arbiration clause did not put employee on notice he was waiving his rights to pursue discrimination claim in federal court); *Heurtebise v. Reliable Business Computers*, 550 N.W.2d 244 (Mich. 1996) (handbook did not create enforceable arbitration agreement since employer did not intend to be bound by any provision contained in handbook); *Ludwig v. Equitable Life Assurance Society of the U.S.*, 978 F. Supp. 1379 (D. Kan. 1997). These cases establish the "knowing and voluntary" standard is accepted beyond the Ninth Circuit and has been applied to employment discrimination cases.

CONCLUSION

Based upon the foregoing, this Court should deny Cyprus' petition for writ of certiorari.

Respectfully submitted,

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Cyprus Bagdad Copper Corporation

PROBLEM SOLVING PROCESS

I have received a copy of the Cyprus Bagdad Copper Corporation Problem Solving Process that is effective August 1, 1997. I understand that this Problem Solving Process statement is meant to be an enforceable contract between me and Cyprus Bagdad. I agree to read it and understand its contents. If I have any questions regarding its contents, I will contact my supervisor or my Human Resources Representative.

Date _____ Name _____
(Please Print Name)

Signature _____

Copy A – Employee Copy

FILED
MAR 30 1998
CLERK

No. 97-1137

In The

Supreme Court of the United States

October Term, 1997

CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERALS COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka JANE DOE HUTCHINSON; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK McKEON, husband; JANE DOE McKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife,

Petitioners,

v.

MELTON NELSON; LANITA NELSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

A. This Case Has Enormous, Not Limited, Significance

Respondents argue that the opinion below is of limited significance because it turned on the particular language of the last page of the employee handbook and was not inconsistent with precedent of this Court or decisions of other federal courts of appeals.

By measuring the language on the last page of the handbook against federal law, the Ninth Circuit disregarded this Court's requirements that the validity of an arbitration agreement be decided under state law and that arbitration agreements be treated no differently than other contracts. See, e.g., *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924 (1995); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337 (1987). The Ninth Circuit did not apply federal law because of the particular language on the last page of the handbook. The significance of the opinion below is, therefore, not limited to the facts of this particular case.

Neither the Eighth Circuit, in *Patterson v. Tenet Health Care, Inc.*, 113 F. 3d 832 (8th Cir. 1997), nor the Fourth Circuit, in *O'Neil v. Hilton Head Hospital*, 115 F. 3d 272 (4th Cir. 1997), has adopted a "knowing" agreement requirement when enforcing employee handbook arbitration agreements. Respondents' citation of two other cases to support their argument that there is no conflict among the circuits only underscores the depth of that conflict. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F. 3d 1126 (7th Cir. 1997), expressly noted the split between the

Ninth and Eighth Circuits, declined to decide the "knowing" agreement issue, and ruled on the validity of the arbitration agreement under Indiana law. 121 F. 3d at 1129-30. *Ramirez-de-Arellano v. American Airlines*, 133 F. 3d 89 (1st Cir. 1997), was decided on grounds not pertinent here but favorably discussed the Ninth Circuit's opinion below. 133 F. 3d at 91, n.2. The First Circuit, therefore, is leaning with the Ninth, opposite the Eighth and Fourth, on this issue.

B. Arizona Law Does Not Diminish the Significance of This Case

In seeking to downplay the significance of this case, Respondents contend that a knowing agreement standard would have also applied under Arizona law, as embodied in *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 937 P. 2d 1382 (App. 1996). This contention addresses whether the particular arbitration agreement here is enforceable and not the significance of Ninth Circuit precedent that requires that the validity of an arbitration agreement be determined under federal law.

The contention also misstates the holding in *Francini*. The question there was whether an employee should be required to exhaust his collective bargaining agreement remedies before bringing an employment discrimination suit. Noting the distinctions this Court has drawn between arbitration provisions in collective bargaining agreements and those found in other contracts, the Arizona court held only that the collective bargaining agreement before it did not require arbitration of the plaintiff's employment discrimination claim. 188 Ariz. at 584.

Respondents' reliance upon *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 840 P. 2d 1013 (1992), is also misplaced. An arbitration agreement in an abortion clinic admissions form was there denied enforcement because it was deemed beyond the "reasonable expectations" of the patient. The court's holding was carefully confined to the facts of the case and, as noted by the dissent, the Arizona "reasonable expectations" standard is not the same as a "knowing" agreement standard. 173 Ariz. at 153, 155.

C. Conclusion

This case is of enormous significance to arbitration agreements, generally, because of the Ninth Circuit's disregard of this Court's precedents and the split in the circuits below.

Respectfully submitted,

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